BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: BILL CALLAWAY & GREG LAY dba WILLIAMS REDI MIX P.O. Box 1175 Williams, CA, 95987 Employer	Docket No. 03-R2D1-2400 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having ordered reconsideration in the above-entitled matter on its own motion, makes the following decision after reconsideration.

JURISDICTION

On March 13, 2003, a representative of the Division of Occupational Safety and Health (the Division) commenced an accident inspection at a place of employment maintained by Bill Callaway & Greg Lay dba Williams Redi Mix (Employer) at 26522 Capay Road, Esparto, California. On May 16, 2003, Employer was cited for a regulatory violation of section 342(a) [serious injury not immediately reported to the Division] of Title 8, California Code of Regulations,[1] with a proposed civil penalty of $5,000. Employer timely appealed the citation contesting the reasonableness of the proposed civil penalty. On August 19, 2005, a hearing was held before an Administrative Law Judge (ALJ) of the Board, at Sacramento, California. William Callaway, Owner, and Lori Walkup, Plant Manager, represented Employer. William Estakhri, District Manager, represented the Division.

On September 1, 2005, the ALJ issued a decision that reduced the civil penalty for the violation from $5,000 to $750.

On September 30, 2005, on its own motion the Board issued an order of reconsideration of the matter and stayed the decision of the ALJ pending a decision after reconsideration. On November 7, 2005, the Division filed its

[1] Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

"Brief on Reconsideration" and a "Request for Official Notice" of certain records and legislative history.[2]

SUMMARY OF CASE

At approximately 11:00 a.m. on Saturday, March 1, 2003, truck driver Robert Wilson (Wilson) was delivering a load of cement to Employer's customer at a general contractor's work site. While taking down some attachment chutes from the truck, Wilson slipped and fell on his fingers.

The general contractor administered first aid to Wilson and then undertook various steps to have him transported to a hospital. At the hospital, Wilson was treated and released at about 5:30 p.m. that same day. He lost the tip of one finger and fractured an adjoining finger.

The general contractor telephoned Employer's office, spoke to the dispatcher and in turn the dispatcher informed Walkup by telephone of the injury and that Wilson was transported to the hospital.

Upon learning of the accident, Walkup went into her office and made telephone calls, three to the injured employee's treating physician. After receiving more complete information about the extent of the injury, at about 1 p.m. she telephoned the State Compensation Insurance Fund to file a report. Having dealt with State Compensation on various situations, she knew their office was available on weekends.

Although Walkup was aware of the requirement to report the injury to the Division, she did not know that the Division had an answering service for weekend calls, or that she was required to report the injury before the next workday. Had she known, she would have reported the accident on Saturday. Walkup telephoned the Division Monday, March 3, 2003, the first business day after the accident.

When asked whether anyone from the Division could even respond to accident reports during the weekend, Weiss replied it was possible but, given the nature of this accident, a report would not have generated an immediate response from the Division, and no one would have been assigned to it on the weekend. The District Manager assigned Weiss to conduct the investigation, on March 10, 2003. Weiss began the process three days later, ten days after the accident was reported.

Weiss evaluated Employer's safety program, toured the site, examined Employer's equipment and interviewed various employees. Had Weiss rated

[2] Section 376.3 of the Board's regulations contemplates that requests for official notice will be made before a decision is issued after an evidentiary hearing. The rules do not contemplate requests for official notice being made, for the first time, while the matter is pending on reconsideration, unless the Board itself is conducting a hearing. The Board has determined that it would not be appropriate to take official notice as requested by the Division.

Employer's safety program for penalty-computation purposes he would have assigned it a rating of "Good," the highest available rating ("effective safety program"), warranting the maximum penalty reduction credits. (§ 335) He said his investigation yielded no violations, except the reporting violation in question.

Weiss cited Employer because the injury fell within the definition of a "serious injury" (finger tip amputation),[3] Employer had not reported the injury immediately, and the 24-hour "tolling" period for "exigent circumstances" had lapsed. Weiss testified that he started with a base penalty of $5,000, which he believed is required by Labor Code section 6409.1. He concluded that he was not allowed to make any adjustments.

Labor Code section 6409.1 (AB 2837, Chapter 885, Statutes of 2002) was amended by the Legislature on January 1, 2003.[4] The Director thereafter promulgated section 336(a)(6).[5] According to the Division, Labor Code section 6409.1(b) requires it to set a minimum penalty of $5,000, which is the authority and rationale for section 336(a)(6) of its regulations.[6] The Division contends that Labor Code section 6409.1(b) is not unique[7] in its application of a mandatory penalty, and that by enacting it the Legislature limited the Appeals Board's general authority to modify penalties. The Division takes the position that Labor Code section 6409.1(b) requires the Board to assess a minimum $5,000 penalty for a section 342(a) violation. We disagree for the reasons detailed below.

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[3] See Labor Code section 6302(h): "Serious injury" is any injury occurring in connection with any employment which requires more than 24 hours of inpatient hospitalization for treatment, or in which an employee suffers a "loss of any member of the body" or suffers any "serious degree of permanent disfigurement."

[4] The amendment added subdivision (b) to section 6409.1 which states:

> In every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a), a report shall be made immediately by the employer to the Division of Occupational Safety and Health by telephone or telegraph. An employer who violates this subdivision *may* be assessed a civil penalty of not less than five thousand dollars ($5,000). (Italics added)

[5] The Director's regulation differs from the language found in Labor Code section 6409.1(b). Section 6409.1(b) says "may be assessed a penalty" and Title 8, section 336(a)(6) says "shall be assessed a penalty."

[6] The Division has not explained how its interpretation of Labor Code section 6409.1(b) is to be reconciled with Labor Code section 6319(g), which provides: "Based upon the evidence, the division may propose appropriate modifications concerning the characterization of violations and corresponding modifications to civil penalties as a result thereof." This provision predates Labor Code section 6409.1(b) and was not amended or referred to by the Legislature when it passed AB 2837.

[7] In support of its position, the Division cites several cases in which the Board held that certain minimum penalties set in the Labor Code were controlling. (*Emerald Produce Co., Inc.*, Cal/OSHA App. 96-2679, Decision After Reconsideration (DAR) (May 4, 1999); *Pacific Underground Construction, Inc.,* Cal/OSHA App. 89-510, DAR (Nov. 28, 1990). Those cases were anomalies, with holdings that were contrary to the predominant theme in Appeals Board precedent. In support, the Division also quotes dicta included in *Gaylord Container Corporation*, Cal/OSHA App., DAR, 99-095 (March 12, 2002)). None of the foregoing cases addressed the Board's authority to modify a statutory minimum penalty under Labor Code section 6602. The foregoing decisions are factually distinct and distinguished to the extent they hold that the Board's authority under Labor Code section 6602 is limited and qualified beyond the requirement that the Board not abuse its discretion in fashioning other appropriate relief. (See, *Stockton Tri Industries, Inc.* Cal/OSHA App. 02-4946, DAR (March 27, 2006).)

ISSUE

If a violation of section 342(a) is found, does Labor Code section 6409.1(b) require the Appeals Board to assess a penalty of no less than $5,000?

I. OVERVIEW OF THE AUTHORITY OF THE BOARD

Pursuant to the California Occupational Safety and Health Act (Labor Code section 6300 *et seq.*, [the Act]) in conjunction with other Labor Code provisions, different agencies within the Department of Industrial Relations, including the Division and the Appeals Board, are assigned different jurisdiction and responsibility regarding occupational safety and health. (*See*, Labor Code §§ 140, 142.3, 148, 148.6, 6302, 6307, *inter alia.*) Sections 6300 through 6332 of the Act set forth the jurisdiction and duties of the Division. The Division is authorized to "impose a civil penalty" (Labor Code §6317; *see, also* Labor Code §6319(b) and (c)). Employers are given the opportunity to appeal citations and any associated penalties to the Appeals Board in Labor Code sections 6319(a) and 6319(b), respectively. Labor Code section 6600 also provides that an employer "served with a citation . . . or a notice of proposed penalty under this part . . . may appeal to the appeals board . . . [the] amount of proposed penalties[.][8]"

Since passage of the Act the Appeals Board has articulated the scope of its authority to determine appropriate monetary penalties. In *Candlerock Restaurant*, Cal/OSHA App. 74-0010, DAR[9] (June 5, 1974), the Board stated in part at page 2:

> The Occupational Safety and Health Act of 1973 (hereinafter referred to as the "Act") establishes the power in the . . . Appeals Board to review and determine the propriety of a citation or a proposed penalty or both pursuant to California Labor Code section 6602. The scope of the review, as designated in said Labor Code section, is total, in that the Board may affirm, modify or vacate the Division's citation or proposed penalty.
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> . . .
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> The legislative intent is plainly manifested; the Division's proposals, in and of themselves, are nothing more nor less than mere proposals. It is the authority which is vested in the Appeals Board that is necessary to transform any proposed penalty into either an enforceable final order or an enforceable decision.

[8] The term "this part" in Labor Code section 6600 refers to Part 1 of Division 5 of the Code, i.e., the California Occupational Safety and Health Act of 1973, now consisting of sections 6300 through 6719. "This part" is used to refer to the Act in other sections as well, such as section 6317.

[9] "DAR" and DDAR" in this Decision After Reconsideration refer to Appeals Board Decisions After Reconsideration and Denials of Petitions for Reconsideration, respectively.

The Board has consistently held that it assesses penalties, while the Division proposes penalties. (The Division agrees that is the proper interpretation of the law.) *York Precision Sheetmetal Works*, Cal/OSHA App. 74-149, DAR (Nov. 7, 1974), *Squaw Valley Development Company*, Cal/OSHA App. 74-167, DAR (March 18, 1975), *Ferma Corporation*, Cal/OSHA App. 74-917, DAR (Nov. 12, 1975), *John Hernstedt Farms*, Cal/OSHA App. 75-437, DDAR (Apr. 22, 1976), and *Capri Manufacturing Co.*, Cal/OSHA App. 83-869, DAR (May 17, 1985).[10]

In *Liberty Vinyl Corporation*, Cal/OSHA App. 78-1276, DAR (Sept. 24, 1980), [reaffirmed in *Stockton Tri Industries, Inc.* Cal/OSHA App. 02-4946, DAR (March 27, 2006)] the Division, as in this case, challenged the Board's authority to reduce penalties. In *Liberty Vinyl*, the Board took into consideration a criminal fine imposed upon the appellant employer by a Court for a related violation. In its decision the Board stated at pages 4-5:

> With legislative intent plainly manifested that the Appeals Board is the final arbiter of penalties if the Division's proposals are contested, and because the Legislature has also entrusted the Appeals Board with a co-equal responsibility of selecting the means of achieving safe and healthful working conditions, selection of a particular remedy for a particular violation in relation to the stated purpose of the Act is peculiarly a matter for its discretion. There being no restriction upon how the Appeals Board may affirm, modify, vacate or direct other relief in considering penalties de novo, it is consistent and reasonable to conclude that the Appeals Board has full discretion in establishing the final monetary penalty necessary to encourage elimination of safety and health hazards provided that such discretion is consistent with the Act. Regulations and criteria are not warranted and are inappropriate for the exercise of such discretion. To hold as the Division wishes would deny rational practical analysis of the Act and would subvert the purpose and policy of the Act in providing an employer the right of independent review and, where appropriate, relief from the Division's proposal. [Emphasis added]

Applying the *Liberty Vinyl* rationale, we find that the Board's authority to determine the ultimate penalty in a case involving the failure to report a serious injury furthers both the letter and spirit of the Act.

II. APPLICATION OF THE BOARD'S AUTHORITY IN REPORTING CASES

Section 342(a), under which Employer was cited, provides:

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[10] *Capri, supra,* involved a mandatory minimum penalty regime under the Carcinogen Act (Health and Safety Code section 24200 et seq.) There the Legislature stated civil penalties "shall be not less than . . .[.]" (Health and Safety Code section 24260.)

> (a) Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
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> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

As noted above, the Division claims it has no choice but to propose a non-adjustable $5,000 penalty based on the Director of Industrial Relations' regulation, section 336(a)(6), which provides:

> For Failure to Report Serious Injury or Illness, or Death of an Employee — Any employer who fails to timely report an employee's injury or illness, or death, in violation of section 342(a) of Title 8 of the California Code of Regulations, shall be assessed a minimum penalty of $5,000. [Emphasis added.]

Even if it were consistent with Labor Code section 6409.1(b), the Director's regulation does not require the *Appeals Board* to assess a $5,000 minimum penalty for all section 342(a) violations regardless of the circumstances of any particular case. Such a conclusion would run afoul of the duties and responsibilities of the Board embodied in Labor Code section 6602.[11]

One of the Board's functions is to exercise independent discretionary authority to adopt, modify, or set aside the penalties proposed by the Division. Blanket adoption of penalties proposed by the Division is not compatible with that function. (*Associated Ready Mix*, Cal/OSHA App. 95-3794, DAR (Dec. 6, 2000).) In *Limberg Construction*, Cal/OSHA App. 78-433, DAR (Feb. 21, 1980) the Board stated at page 3:

> To hold that the Appeals Board is bound by regulations adopted by the Director and penalties proposed by the Division would ignore the language of the Labor Code, deny an employer the right of independent review of the Division's proposal, and frustrate the purpose of providing fair and equitable enforcement of the California Occupational Safety and Health Act of 1973.

[11] The Division argues Labor Code section 6409.1(b) must be read to bind the Appeals Board as well as itself. Our reading, particularly in light of the text of that section and the need to harmonize it with the other Labor Code provisions unaltered by AB 2837, is that it is binding only on the Division.

Since at least 1984, Labor Code section 6602 has remained unchanged. Presumptively, the Legislature is regarded as having in mind existing laws when it passes a statute, and its failure to change the law in a particular respect manifests legislative intent to leave the law as it stands. In adopting legislation, the Legislature is presumed to also know the decisional history of how the statute has been applied in that body of decisional law. (*Estate of McDill* (1975) 14 Cal.3d 831, 837-839; and *Bailey* v. *Superior Court* (1977) 19 Cal.3d 970, fn. 10.)

The presumption applies with equal force to state administrative agency decisional law interpreting statutes and regulations. (See, e.g., *Moore* v. *California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1017 [9 Cal. Rptr.2d 358] cert. denied 113 S.Ct. 1364; and *Robinson* v. *Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 233-235 [5 Cal.Rptr.2d 782]. ["Long standing, consistent administrative construction of a statute by those charged with its administration, particularly where interested parties have acquiesced in the interpretation, is entitled to great weight and should not be disturbed unless clearly erroneous." [*Rizzo* v. *Board of Trustees* (1994) 27 Cal. App 4th 853, 861]

Labor Code section 6600, which was last amended in 1976, creates an employer's right to appeal citations issued under Labor Code section 6317 or notices of proposed penalties issued under the Act. Since Labor Code section 6409.1(b) is part of the Act, employers have the right to appeal penalties proposed under Labor Code section 6409.1(b) unless the Legislature provides otherwise.

Because the Legislature left Labor Code sections 6600 and 6602 intact when it amended the Labor Code in AB 2837, we must infer that the Legislature manifested its intent to leave the unchanged portions of the law as they stand. Generally, statutory grants of authority are not considered superseded by subsequent legislation, "except to the extent that such legislation shall do so expressly." (*Armistead* v. *State Personnel Board* (1978) 22 Cal.3d 198, 202.)[12]

In 2003 the Legislature did not express limitations on an employer's right to appeal penalties or the Board's authority to assess them when it amended Labor Code section 6409.1. Therefore we can not *imply* a legislative restriction or qualification of the Board's authority over proposed penalties. "The courts assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes. (*Stafford* v. *Realty Bond Service Corp.*, (1952) 39 Cal.2d 797, 805; *Lambert* v. *Conrad,* (1960) 185 Cal.App.2d 85, 93; 1 Sutherland, Statutory Construction (3d ed.), section 2012, pp. 461-466. [Internal quotations omitted.]) Thus there is a

[12] Also, compare Labor Code section 6712(d)(1) where the Legislature unambiguously set a minimum penalty. Its decision not to do so in Labor Code section 6409.1(b) is taken to mean it did not intend to bind the Appeals Board, but only the Division. (Compare *Emerald Produce Co., Inc.*, supra).

presumption against repeals by implication; they will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier; the courts are bound to maintain the integrity of both statutes if they may stand together." *Fillmore* v. *Irvine* (1983) 146 Cal.App.3d 649, 657. [Internal citations and quotations omitted.]

In light of the statutes and cases discussed above in Section II, the Board as a quasi-judicial body must examine the facts of each case to determine if there was a violation (here of the section 342(a) reporting requirement) and to establish what penalty, if any, should be assessed. (Labor Code §6602) Doing so promotes the fair administration of the Act by ensuring that a proposed penalty does not unfairly exceed what is justifiable under the circumstances of the violation once established.[13] For example, assessing an "unalterable penalty" may treat an employer who technically but unintentionally violated the requirement the same as those employers who have no safety programs at all, who do not enforce their safety programs, and who have a history of safety violations.

Assessing a fixed minimum $5,000 penalty would place this Employer in the same category as employers who *purposely* decline to report a serious work-related injury at all. Indeed, such result creates a *disincentive* for reporting serious work-related injuries. The employer is faced with the choice of reporting the injury late and facing a certain $5,000 fine, or not reporting it at all, hoping that the Division never finds out. Logically, many employers faced with a similar choice would opt not to report, defeating the purpose behind the reporting requirement, preventing the Division from quickly inspecting an accident location to determine if any hazards to other employees remain, and frustrating the objectives of the Cal/OSHA Act.

Removing any discretion to take certain factors into account when assessing a civil penalty would conflict with Labor Code section 6602, weaken the Board's ability to modify a proposed penalty or order "other appropriate relief," and would erode established incentives that encourage employers to comply with other provisions of the Act.

Civil penalties may have a punitive or deterrent aspect, but their primary purpose should be to secure obedience to statutes and regulations enacted to serve public policy objectives, the amounts should not exceed levels necessary to punish and deter, and the amount should bear some relationship to the gravity of the offense, not be disproportional to it. (*City and County of San Francisco* v. *Sainez* (2000) 77 Cal.App.4th 1302.)[14]

[13] *Hale* v. *Morgan*, (1978) 22 Cal.3d 388.
[14] See also *Anresco, Inc.*, Cal/OSHA App. 90-855, DAR (Dec. 20, 1991).

III. APPROPRIATE RELIEF IN THE CURRENT CASE

As a general approach, we conclude that an employer that reports a serious injury to the Division, albeit belatedly, should not be in the same category as an employer that purposely fails to report at all. Although ignorance of the duty to independently report is no defense to a violation[15], the *penalty* for the violation should not be disproportionate to the infraction.

In determining a proper penalty under the current statutory scheme, the Board takes into account the Legislature's direction to the Division in amending Labor Code section 6409.1 as well as the Legislature's leaving undisturbed the Board's duties and authority under Labor Code section 6602.

The purpose of Labor Code section 6409.1(b) (and the Division's corresponding regulation § 342(a)) is to impel *employers* to report every serious injury quickly, so the Division can initiate an investigation. In the instant case, Employer's failure to report the injury appears not to have delayed this investigation. Taking into account the Legislature's intent, the objectives of the Act, and the circumstances, it is found that the $750 penalty assessed by the ALJ is reasonable. That amount, which is hereby affirmed, recognizes Employer's innocent mistake, its effective safety program, and its proactive stance on promoting safety. It also acknowledges the Legislature's aim to aggressively encourage compliance with reporting duties, while minimizing the disincentive to report created by applying the $5,000 minimum penalty across-the-board.

DECISION AFTER RECONSIDERATION

Employer contested the reasonableness of the Division's proposed penalty. The Board has, as it must, reviewed all relevant facts to determine the reasonableness of Employer's conduct under the then-existing circumstances which resulted in the failure to comply with section 342(a). Although the existence of the violation was not contested (and thus, is established by operation of law), the same facts as well as other relevant facts must be reviewed for purposes of determining whether the proposed penalty is reasonable.[16]

The Board agrees with the ALJ's analysis of the facts, including the assessment of Employer's conduct at the time following the employee's accident

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[15] *Steve P. Rados, Inc.*, Cal/OSHA App. 97-575, DAR (Nov. 22, 2000); and *Jaco Oil Company*, Cal/OSHA App. 97-943, DAR (Nov. 22, 2000).

[16] The Board has previously characterized its inquiry as to the reasonableness of a proposed penalty by acknowledging that while the existence of the violation is not in issue (through waiver or establishment of the violation), the evidence regarding the existence is relevant to determining the reasonableness of the penalty (*System 99, A Corporation*, Cal/OSHA App. 78-1259, DAR (Aug. 30, 1982).) We believe that adherence to such formulation is too restrictive since other facts which do not address the existence of the violation, e.g. the conduct of a third party or intervening events over which the employer has little or no control, may be relevant to the reasonableness of the proposed penalty. The particular facts of the case must be considered and any modification or other appropriate penalty relief is to be given on a case-by-case basis.

and that the delay in reporting had no impact on the Division's ability to investigate or to inspect the workplace to ensure worker safety.

Assessing the flat $5,000 penalty would impact this Employer, which had less than 10 employees, more severely than larger employers with larger cash flows. This factor and all the others mentioned persuade the Board that Employer requires less of a penalty to induce conformity to the letter of the reporting regulation than may larger employers with no reporting systems in place. For example, as explained above, Employer was diligent and knew of the reporting requirement but incorrectly assumed it could not immediately report the accident due to the incident occurring on a weekend. However, all California employers have an affirmative duty to stay current with the safety standards, orders, and regulations affecting their operations. (*McKee Electric Company*, Cal/OSHA App. 81-0001, DDAR (May 29, 1981). Therefore, some penalty amount is appropriate in this case.

As was also discussed above, assessing a $5,000 civil penalty may place an employer who technically violated the reporting requirement (reported albeit late) in the same category as employers who purposely decline to report and create a disincentive for reporting. Here, Employer knew of the reporting obligation, fully intended to report the injury, demonstrated an ability to report and did so on the first day (Monday) it believed was possible to report.

Accordingly, the Board finds that the proposed $5,000 penalty exceeds the level necessary to achieve the purpose of compelling *this* Employer to conform. The Board finds that a penalty of $750 is appropriate under all the circumstances.

ORDER

IT IS HEREBY ORDERED THAT the citation is established and the penalty is modified as indicated above and Employer is ordered to pay a $750 civil penalty.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: July 14, 2006